IN THE

Supreme Court of the United States

October Term, 1971.

No. 70-6.

NELLIE SWARB, et al.,

Appellants,

v.

WILLIAM M. LENNOX, et al.,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF OF THE PENNSYLVANIA BANKERS ASSOCIATION AS AMICUS CURIAE.

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INTEREST OF *AMICUS CURIAE*, PENNSYLVANIA BANKERS ASSOCIATION

The Pennsylvania Bankers Association (P. B. A.) files this brief *amicus curiae* in opposition [1] to the claim that procedures available in the State courts of Pennsylvania for the entry of record of a money judgment on the

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1. The following have appeared in this matter either nominally or as *amicus curiae* on the appellees' side of the case:

(a) The named defendants in the court below, the Prothonotary and Sheriff of Philadelphia County, take no position on the merits.

(b) The Attorney General of Pennsylvania, who is given standing in the case for the purpose of defending the Constitutionality of state statutes, has filed a brief which joins the appellants in seeking to have the procedures involved declared unconstitutional on their face. This position of the Attorney General should be considered in the light of the conduct on the part of personnel of the Pennsylvania Department of Justice who have participated in this case in this Court in the name of the Attorney General as appellee after having participated in the case as attorneys for the appellant both in the lower court and in this Court. See Motion of P. B. A. for leave to file brief as *amicus curiae* filed June 18, 1971.

(c) The intervenor defendants who participated in the case in the lower court are not participating in this appeal. However, counsel who represented them but who are not now representing any client have filed a brief in which it is stated (at page 3) that "the principal function of this Brief will be to demonstrate how the District Court's objections to the existing confession of judgment procedure can be obviated."

(d) Pennsylvania Land Title Association has filed a brief *amicus curiae* solely on the question whether any decision as to unconstitutionality should be made prospective only.

(e) The Pennsylvania Credit Union League has filed a brief *amicus curiae* in which the argument is based on the "primary interest of the League . . . in a security device" and "the execution aspects of the challenged Pennsylvania statutes and procedures are a secondary consideration with the League." (at pages 6-7)

(f) The Pennsylvania Savings and Loan League has filed a brief *amicus curiae* which states that it is seeking to sustain the practice of using confession of judgment clauses in bond and mortgage transactions (at page 2). The brief is based on the position that the "situation of these savings and loan associations is quite different from that of other creditors using confession

authority of a written agreement of a debtor are invalid under the Federal Constitution. P. B. A. also submits that the federal courts should withhold any decision on the question pending action concerning the matter by the Supreme Court of Pennsylvania.

P. B. A. is an association of more than 450 commercial banks located in Pennsylvania. Its members in their business engage extensively in the granting of loans and other credit to individuals, partnerships and corporations upon the security of "judgment notes" and other instruments and contracts which authorize the holder to have a judgment entered of record upon the written agreement of a borrower or debtor.

The appeal before this Court questions the constitutionality of procedures in the courts of Pennsylvania which permit such judgments subject to Rules of Civil Procedure adopted by the Supreme Court of Pennsylvania. If the appeal should be upheld by this Court in whole or part, credit and loan practices of the members of P. B. A. would be adversely affected with the expected consequence that credit availability would be lessened for those who may deal with members of P. B. A. In addition, the basis for such a ruling could draw into question the validity of other

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of judgment." (at page 3). P. B. A. argues for the constitutionality of the judgment procedure without distinction as to type of creditor or type of credit.

(g) The American Bankers Association has been granted leave to file a brief *amicus curiae* on the basis of a motion that stated its brief would be principally "in opposition to proposals to extend the scope of the decision in this case beyond the rulings of the District Court. (Motion, p. 10.) The American Bankers Association has advised P. B. A. that it supports P. B. A.'s major positions and will adopt by reference to P. B. A.'s brief many of the arguments that P. B. A. advances.

Accordingly, P. B. A. is the only active participant in this appeal which is taking a position in complete opposition to the decision of the lower court and the contentions of appellants and is the only participant arguing the question in point II of this brief.

established practices not related to judgment notes since members of P. B. A. and other credit extenders often obtain collateral for loan and credit transactions through mortgages of real estate, pledges of stocks and bonds and security interests in automobiles and other personal property which allow retaking and sale of specific property upon default.

The interest of credit extenders in available methods of obtaining security is reciprocal with the interest of borrowers and other users of credit since the provision of security is often a factor or the determinant in a decision to grant credit. The entry of judgment on the basis of the agreement of a borrower is a traditional method of obtaining such security in Pennsylvania since a judgment of record, even when entered prior to default, is a lien on interests in real estate owned by the debtor in the county where the judgment is entered.

There are several reasons why a judgment note or similar agreement is used in practice by banks rather than a real estate mortgage. Banking laws and regulations restrict the use of real estate mortgages as security for loans. The judgment note is also simpler and less expensive as to form, content, execution, recording in a public office and termination of such recording on payment. It is also less definitive as to the creation of a lien against the customer since many judgment notes and agreements are never entered of record but are merely held while the loan or credit is outstanding with the possibility of subsequently entering them in the event of a change in the credit condition of the customer. Mortgages, on the other hand, are typically entered of record promptly because of possible legal effects that could arise from delay in recording. All of these reasons resulted in the traditional practice among banks in Pennsylvania to make use of judgment notes notwithstanding the better security of mortgage liens. See footnote 8 at page 22.

SUMMARY OF ARGUMENT.

The court below ruled that, prospectively after the effective date of its order, procedures in Pennsylvania for entry of judgments on the written authority of debtors would be unconstitutional as applied to debtors with an income of less than $10,000 a year in cases of consumer credit other than mortgages unless it were shown that the debtors "intentionally, understandingly, and voluntarily waived all the rights lost under Pennsylvania law." *Swarb v. Lennox*, 314 F. Supp. 1091, 1103 (E. D. Pa. 1970). Appellants claim that such procedures for entry of judgment by agreement are unconstitutional on their face and seek reversal of the court below to the extent its ruling was limited to particular classes of cases. P. B. A. claims first that the Pennsylvania procedures are constitutional and second, that the federal courts should abstain from ruling on the constitutional question until the Pennsylvania Supreme Court has ruled on the attack directed at its own rules.

I.

The lower court's perception of the practical and legal effects of the procedures for entry of judgment by virtue of a debtor's agreement was incomplete and inaccurate and on the basis of this wrong understanding of State procedures the lower court drew insupportable inferences of constitutional effects. The State procedures in question fully comply with the requirements of Due Process and the procedures are adequately supervised and controlled by the Pennsylvania courts.

II.

In the alternative, the federal courts should apply the abstention doctrine to withhold any ruling on the constitu-

tional issue until the Supreme Court of Pennsylvania has considered the issue at hand not only because of the general considerations of Federal-State relationships that are the essence of the abstention doctrine but also because of the special role of the Pennsylvania Supreme Court under the State Constitution with respect to the court procedures involved.

Argument.

I. THE PENNSYLVANIA JUDGMENT PROCEDURES ARE CONSTITUTIONAL.

A. The Pennsylvania Judgment Procedures in Question Are Common Law Court Procedures Over Which the Courts of Pennsylvania Exercise Proper Supervision and Control.

The procedures for entry of judgment on the basis of agreement have been used in the courts of Pennsylvania throughout its history [2] and trace their origin to the English common law and practice.[3] Marks of this history are found in the expressions "confession of judgment," "cognovit"

2. *Barde v. Wilson*, 3 Yeates 149, 150 (1801). In *Kirkbride v. Durden*, 1 Dall. 288 (1788) the argument of counsel refers to the judgment practice as "old and constant practice in Pennsylvania both before and since the revolution." *Id.* at 290. The argument further states that the form of the warrant of attorney in that case is the same that has been used for more than a century past. *Id.*

3. "Blackstone in his Commentaries on the Law of England, Book III, pages 395-396, refers to four types of judgment: 'First, where the facts are confessed by the parties, and the law determined by the court; as in case of judgment upon *demurrer:* secondly, where the law is admitted by the parties and the facts disputed; as in case of judgment on a *verdict:* thirdly, where both the fact and the law arising thereon are admitted by the defendant; which is the case of judgments by *confession* or *default:* or, lastly, where the plaintiff is convinced that either fact, or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution; which is the case in judgments upon a *non-suit* or *retratrix.*' Blackstone further discusses confession of judgments as follows (397): '. . . it is very usual, in order to strengthen a creditor's security, for the debtor to execute a warrant of attorney to some attorney named by the creditor, empowering him to confess a judgment by either of the ways just now mentioned (by *nihil dicit, cognovit actionem,* or *non sum informatus*) in an action of debt to be brought by the creditor against the debtor for the specific sum due: which judgment, when confessed, is absolutely complete and binding . . .' *Nihil dicit* is where a defendant suffers judgment to go against him by default for the reason that no plea is entered to the plaintiff's declaration.

and "warrant of attorney" still in use in connection with these procedures.

The Supreme Court of Pennsylvania has described the essence of the procedures:

> "The confession of judgment is but one of the ways and processes by which a person is sued. It is a voluntary submission to the jurisdiction of the court given by consent and without the service of process." *Horner Sales Corp. v. Motor Sport Inc.*, 377 Pa. 392, 395, 105 A. 2d 285, 286 (1954).

Entry of judgment on the basis of agreement is a common law procedure which is not dependent on statute. The Act of 1806, Pa. Stat. Ann. tit. 12, § 739 (Purdon 1971), permits a prothonotary or court clerk in certain cases to enter a judgment on the basis of agreement but that statute is not exclusive:

> "Independently of that Act, an amicable action may be entered by attorney. It has been a long and general practice." *Cook v. Gilbert*, 8 S. & R. 567, 568 (1822). See also *Kros v. Bacall Textile Corp.*, 386 Pa. 360, 364-365, 126 A. 2d 421, 424 (1956); *Noonan v. Hoff*, 350 Pa. 295, 298, 38 A. 2d 53, 55 (1944).

The essential question before this Court in this case, therefore, involves common law court procedures and not statutory remedies.

Confession or *cognovit actionem* acknowledges the plaintiff's demand to be just. *Non sum informatus* is where defendant's attorney declares he has no instruction to answer to the plaintiff or say anything in defense of his client. In reality, there was but one judgment by confession at common law and that was judgment by *cognovit actionem*. A second is sometimes said to be a judgment by confession *relicta verificatione*. See 31 Am. Jur. Judgments, Section 465; 34 Corpus Juris 97. This is, however, defined as 'a *cognovit actionem* accompanied by a withdrawal of the plea': Black's Law Dictionary." *Commonwealth v. Central R. R. Co. of N. J.*, 358 Pa. 326, 333-334, 58 A. 2d 173, 177 (1948).

As actions in the courts, these proceedings have always been subject to judicial surveillance and control. The earliest reports of Pennsylvania decisions exemplify that control: *Gerard v. Bassè,* 1 Dall. 119 (1784) (judgment entered against partners on a bond held to bind only the partner who signed the bond); *Shoemaker v. Shirtliffe,* 1 Dall. 133 (1785) (execution could not be issued on a judgment entered on a bond prior to the maturity of the bond).

The standards applied by the Pennsylvania courts in granting judicial relief from judgments entered on agreement have from the earliest times been extremely liberal. In *Gerard v. Basse,* 1 Dall. 119 (1784) the test stated was whether ". . . there was a real *bona fide* debt due . . ." and whether defendant had ". . . executed the bond and warrant of attorney, freely and without compulsion, and that there is no ground for setting it aside, from any unfairness in the transaction.", *Id.* at 122. These standards impose broad dual tests:

> the reality of the debtor's authorization for the entry of judgment
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> and
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> the substantive justice of the enforcement of the judgment.

The course of Pennsylvania decisions over two centuries has not departed from these tests but has reinforced them.[4]

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4. Similarly strict tests have been applied in this Court when dealing with judgments entered on the basis of agreement: *Grover & Baker Sewing Machine Co. v. Radcliffe,* 137 U. S. 287 (1890) (judgment confessed in Pennsylvania not enforceable in Maryland because entered by prothonotary rather than by attorney pursuant to terms of warrant); *National Exchange Bank of Tiffin v. Wiley,* 195 U. S. 257 (1904) (Ohio judgment for payee of note not enforceable in Nebraska because not entered in favor of holder of note as provided in warrant).

To test the reality of a debtor's authorization the Pennsylvania courts have required that a warrant to enter judgment be in writing, that it be "self-sustaining," that it be signed by the debtor; that the debtor be "conscious of the fact" of the warrant and that the debtor's signature bear a direct relation to the warrant so that in a "form" contract or in a multiple page contract, for example, its location and prominence must assure the debtor's awareness of its presence. See *L. B. Foster Co. v. Tri-W. Const. Co., Inc.*, 409 Pa. 318, 186 A. 2d 18 (1962); *Frantz Tractor Company v. Wyoming Valley Nursery*, 384 Pa. 213, 120 A. 2d 303 (1956); *Horner Sales Corp. v. Motor Sport Inc.*, 377 Pa. 392, 105 A. 2d 285 (1954); *Cutler Corp. v. Latshaw*, 374 Pa. 1, 97 A. 2d 234 (1953).

In applying the test of substantive justice as a criterion for judicial control of judgments based on agreement, the Pennsylvania trial courts have been directed to be "strict in passing upon the validity of judgments so entered." *Scott Factors v. Hartley*, 425 Pa. 290, 292, 228 A. 2d 887, 888 (1967). A trial judge in determining whether to grant relief from such a judgment must decide merely whether "doubt exists as to the real justice and equity of the case" and the exercise of his equitable powers will not be reversed in the absence of an abuse of discretion. *Klein v. Mathewson*, 384 Pa. 298, 302, 121 A. 2d 577, 579 (1956); *Universal B. Sup., Inc. v. Shaler H. Corp.*, 409 Pa. 334, 186 A. 2d 30 (1962). A purported waiver of the right to seek such judicial relief is disregarded since:

> ". . . it is well established that such a waiver applies only to technical or procedural irregularities and not to substantive or fundamental questions of liability or the amount thereof." *Kros v. Bacall Textile Corp.*, 386 Pa. 360, 367, 126 A. 2d 421, 425 (1956).

Commentators have observed that in the practical application of these standards the Pennsylvania courts have been liberal in setting aside or opening judgments entered by agreement to permit defenses to be raised. Toomepuu, *Cognovit Judgments and the Full Faith and Credit Clause*, 50 Boston U. L. Rev. 330, 337 (1970).

The common law control of the courts over judgments entered on the basis of agreement has been expanded in Pennsylvania by the special authority over all court procedures in civil actions given to its Supreme Court. As amended by the people in 1968, the Pennsylvania Constitution in Art. V, § 10(c) ordains:

> "The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions."

This provision confers on the Pennsylvania Supreme Court authority to promulgate rules for procedure in the

State courts which supersedes the power of the Pennsylvania General Assembly to govern the same subject by statute. Accordingly, the question before the Court in this case involves not only a matter of court procedures, as noted above, but also a question of procedure within the ultimate control of the State's highest court rather than its legislature.

B. The Pennsylvania Judgment Procedures Provide Notice and Opportunity for Hearing Substantially the Same as the Pennsylvania Assumpsit Procedures in Compliance With Due Process Requirements.

Article V, Section 10(c) of the Pennsylvania Constitution enlarged the limited power which the Pennsylvania Supreme Court formerly had by statute to adopt procedural rules for civil actions. Pa. Stat. Ann. tit. 17, § 61 (Purdon 1962). By that authority and currently by virtue of the Constitutional provision, the Pennsylvania Supreme Court has adopted rules for "Confession of Judgment for Money", Pa. R. C. P. 2950 et seq., Pa. Stat. Ann. tit. 12 (Purdon Supp. 1971) and rules for "Action in Assumpsit", Pa. R. C. P. 1001 et seq., Pa. Stat. Ann. tit. 12 (Purdon 1971) which is the ordinary form of contract action including action on debt.

An understanding of the similarity of the two procedures is needed in order to resolve the question of whether there is a Due Process deficiency in the Pennsylvania procedure for the entry of a judgment with a debtor's agreement. This is particularly true since the court below correctly accepted the propriety of the procedural rules for assumpsit but incorrectly understood the confession of judgment rules and believed them to be so different from the assumpsit rules as to be constitutionally deficient.

The case that is the one with which members of P. B. A. would ordinarily be concerned is a loan evidenced by an obligation which authorizes entry of judgment. The following is a summary of the steps required in each such case before the debt could be collected through sale of the debtor's real or personal property.

In an action of assumpsit the creditor would have to file a written statement of the cause of action ("complaint") normally with a copy of the debtor's note attached and a verification of the statements made by oath or affirmation (Pa. R. C. P. 1019 and 1024). Service on the debtor is required (Pa. R. C. P. 1009 and 1027). The debtor has a 20 day period for filing a responsive pleading (Pa. R. C. P. 1026). A denial by the debtor of the existence of the obligation or other essential stated in the complaint would have to be made specifically (Pa. R. C. P. 1029 (b)). In the absence of such a specific denial or an affirmative defense the plaintiff may move immediately for judgment upon default or admission (Pa. R. C. P. 1037), for judgment on the pleadings (Pa. R. C. P. 1034) or for summary judgment (Pa. R. C. P. 1035). An affirmative defense of the debtor, including payment of the obligation, would have to be set forth in "new matter" or as a counterclaim (Pa. R. C. P. 1030 and 1031). Any pleading of the debtor would have to be verified (Pa. R. C. P. 1024). In the event an issue of fact is raised by the pleadings, the parties may take depositions and engage in discovery (Pa. R. C. P. 4001 et seq.). The depositions and discovery may be used as the basis for a motion for summary judgment (Pa. R. C. P. 1035). The matter proceeds to trial only if there is a "genuine issue of material fact."

In an action to enter a judgment by confession the creditor must file a verified statement ("complaint") normally with a copy of the debtor's note attached (Pa.

R. C. P. 2951), unless the prothonotary may enter the judgment under the Act of 1806 (Pa. R. C. P. 2951). The latter procedure requires production of the note to the prothonotary and the amount due must appear from the face of the instrument; the procedure may not be used if the entry of judgment requires the occurrence of a default or condition precedent which cannot be determined from the face of the instrument (Pa. R. C. P. 2951(e)). Whichever method of entry of judgment is used, the plaintiff must, under requirements that may not be waived, mail notice of the entry to the defendant and file with the prothonotary an affidavit of the mailing of the notice and no execution may be proceeded with until 20 days after the notice has been mailed and the affidavit has been filed (Pa. R. C. P. 2958). Although the same rule permits a writ of execution to be issued within the first 20 days after the entry of the judgment (for the purpose of obtaining priority of lien on personal property), it may not be proceeded with so that no sale of the debtor's property could even be scheduled until after the 20 day period following the required notice and affidavit; no execution may be issued within that notice period in any other case. Defendant may seek relief from the judgment by a petition (verified under Pa. R. C. P. 206) to strike or to open it which may be filed at any time; the court is required to issue a rule to show cause if the petition states prima facie grounds for relief and may stay the proceedings; disposition of that rule may be made on the pleadings, testimony, depositions, admissions and other evidence (Pa. R. C. P. 2959).

This comparison of the assumpsit action and the judgment action shows there is simply no foundation for appellants' arguments that the judgment procedure deprives a debtor of "notice and an opportunity to be heard before he may be deprived of any property" or that it is "a denial

of access to the Courts". Brief of Appellants at pp. 9 and 26. In both the assumpsit and judgment procedures there are mandatory notice [5] requirements and a minimum 20 day period before action to take property from a debtor through sale on execution [6] and in both there is an identical opportunity to seek a ruling by a court on claims of the debtor supported merely by verified statement that will entitle the debtor to have a trial.

C. The Court Below Misinterpreted the Law and Did Not Understand the Pennsylvania Practice With Respect to the Judgment Procedures in Question Causing It to Err in Its Decision With Respect to Due Process.

The court below, without specific reference to the Rules of Civil Procedure summarized above, expressed several

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5. As to judgments entered on the basis of agreement there are additional notices in some cases, over and above the notice that must be given by the agreement itself for it to be a valid one under Pennsylvania law. In any case subject to Regulation Z of the Board of Governors of the Federal Reserve System under the Truth in Lending Act, 15 U. S. C. A. § 1601, a prescribed notice must be given to a borrower who signs an agreement which may result in a lien on his principal residence; a note or agreement authorizing the entry of judgment has been construed to be within this requirement. 12 C. F. R. § 226.202 (1971). Since purchase money mortgages are excluded from this requirement the references to it by the lower court in connection with real estate settlements (314 F. Supp. at 1098) and the absence of reference to it in all consumer transactions other than purchase money mortgages indicate that the lower court completely misunderstood the requirements.

6. Any sale on execution against personal property must also be preceded by notices given by the sheriff by handbills posted at least 6 days before the sale under Rule 3128. In the case of a sale of real estate notices must be posted by the sheriff by handbills at least 10 days prior to the sale and also by notices by newspaper publications for 3 weeks prior to the sale with the first publication not less than 21 days prior to the sale under Rule 3129. In either case under the applicable rule the court may by general rule or special order require additional notice to the defendant.

views about the differences between a judgment action and "a normal or pre-judgment creditor-debtor action." 314 F. Supp. at 1095. These views were at the heart of its holding that the judgment procedure is unconstitutional in certain circumstances. *Id.* at 1100. Each of these must be considered since it is submitted that the error in these views led the court into error in its conclusion.

The court said: "The burdens of establishing a defense imposed upon a defaulting debtor who has signed a contract containing a confession of judgment clause and against whom judgment has been entered are greater than those faced by the typical debtor." *Id.* at 1094. This statement (which assumes the existence of a debt and its non-payment) ignores the requirements in an action of assumpsit under Rule 1030 that an affirmative defense has to be pleaded as "new matter" and under Rule 1031 that a counterclaim or set-off has to be pleaded as a counterclaim. As to any of these the defendant has the burden of proof. *Baldwin v. Devereux Schools, Inc.*, 302 Pa. 569, 574, 154 A. 21, 23 (1931.) The action that has to be taken by a defendant in an assumpsit action to avoid a default judgment, judgment on the pleadings or summary judgment is not substantially different from the action required in seeking relief against a judgment entered by confession which requires under Rule 2959 merely a verified statement of "prima facie grounds for relief."

The court also overlooked the rules of law as to actions on promissory notes under section 3-307 of the Uniform Commercial Code that a signature on an instrument is admitted unless specifically denied in the pleadings and that "When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense." Pa. Stat. Ann. tit. 12A, § 3-307 (Purdon 1970).

In short, the actions required of a debtor for defensive purposes under the Pennsylvania practice are not materially different whether he is answering a complaint in assumpsit or filing a petition to open or to strike a judgment entered by confession and his time for taking action is identical in both cases. With respect to the various kinds of defenses which might be available to a debtor, such as forgery, payment, accord and satisfaction, waiver, set-off or counterclaim (see Pa. R. C. P. 1030 and 1031), there is no important practical difference in the steps to be taken by a debtor in a *bona fide* compliance with the requirements for verified pleadings in either the assumpsit or judgment procedures.

The same correct understanding of the Pennsylvania procedures answers the comments of the court below relating to the procedure on a petition to open judgment. The court said: "The most striking feature of this latter petition is that the burden of proof is placed upon the debtor who is considered the proponent of a claim and who must convince the court of the need for equitable relief. . . . The placing of this burden upon the debtor is in direct contrast to the burdens in a normal or pre-judgment creditor-debtor action." 314 F. Supp. 1094-95. Again the court below failed to recognize the substantial identity of the defensive actions available to a debtor and the respective burdens of proof in both cases. Furthermore, the court below ignored entirely the course of the Pennsylvania decisions and practice, discussed above, of strictness in passing on the validity of judgments entered by confession and liberality in opening such judgments in the interest of substantive justice.

The court below plainly erred in its statement that depositions are the only basis on which a judge may decide whether to open a judgment. *Id.* at 1095. Pa. R. C. P. 2959(e) specifies that the court shall dispose of a rule to show cause why a judgment should not be stricken or

opened "on petition and answer, and on any testimony, depositions, admissions or other evidence."

The court then added at the same place that: "Besides the burden and expense necessitated by the preparation of these transcripts, the debtor will also require the services of an attorney." *Id.* The need for a responsive pleading in an assumpsit action would make it highly inadvisable for a debtor not to have the services of an attorney in that type of action also. If a layman in fact seeks to represent himself in either case, he is likely to be better off in the more indulgent atmosphere of the equitable principles that govern petitions to open judgments than in the more technical arena of responsive pleadings in law actions. Depositions are not peculiar to a petition to open (when they are used) since they would be involved in discovery proceedings in an assumpsit action where affirmative defenses are asserted.

The lower court at 314 F. Supp. 1095 quoted an excerpt from an opinion of the Pennsylvania Supreme Court in 1953 apparently as an indication of an unfavorable attitude of that court toward the use of authorizations for entry of judgment. The florid language of that excerpt (and of the portion of it omitted by the lower court) is neither accurate nor representative of the views of the Pennsylvania court. Compare the quotation from the opinion of the same court in the *Horner* case in 1954 at page 7 of this brief. In promulgating rules for confession of judgment in 1969 and 1970, Pa. R. C. P. 2950 et seq., the Pennsylvania Supreme Court confirmed that there is no inherent animosity toward the procedure despite the strict supervision of its use.

After it concluded that the Pennsylvania judgment procedure violated the Fourteenth Amendment, the court below mentioned for the first time, in passing, the notice requirement under the state Supreme Court rules. The court below said: "We do not believe that the 20 day notice

provision prior to execution of a confessed judgment under Pa. R. C. P. 2958(b), as recently revised, grants sufficient time to permit a debtor with limited resources to secure an attorney to undertake the above-described procedures for opening or striking off a confessed judgment." 314 F. Supp. at 1101. Since the 20 day period is identical with the notice period for an answer to a complaint in assumpsit, Pa. R. C. P. 1026, the court was thereby impugning the validity of any action at law in Pennsylvania (or, in fact, of any action in the Federal courts). More directly, for the purpose of this case, the court's comment indicates that when it decided that the judgment procedure did not provide the notice required by Due Process, it had disregarded an essential fact which was contrary to its conclusion.

The lower court's mistakes about Pennsylvania law and practice which emerge from this analysis were of crucial importance since its decision purported to be based mainly on practical rather than formal differences between the judgment and assumpsit procedures in Pennsylvania. Both procedures provide substantially equivalent opportunities—and burdens—for a debtor seeking to protect his property from execution sale for unpaid debt. Nothing in the Bill of Rights or its interpretation by this Court should exalt one procedure over the other. On the contrary, the Pennsylvania judgment procedure is well within the Due Process precedents.

This case is ruled specifically by *American Surety Co. v. Baldwin*, 287 U. S. 156 (1932) which dealt with a judgment entered against a surety on the basis of a bond. Justice Brandeis set forth the heart of the question and the Court's decision at 168:

> "The Surety Company contends in No. 21 that even if the trial court of the State had jurisdiction, the

federal district court may enjoin the enforcement of the judgment on the ground that, having been entered without notice and an opportunity for a hearing on the construction of the bond, it lacked due process of law. It is true that entry of judgment without notice may be a denial of due process even where there is jurisdiction over the person and subject matter. But that rule is not applicable here. For if the bond properly construed stayed the judgment as against Anderson, the Surety Company consented to the entry of judgment against it without notice for his failure to pay. If the bond did not stay the judgment as against Anderson, the trial court confessedly erred in entering the judgment on the bond. In order to contest its liability the Surety Company had the constitutional right to be heard at some time on the construction of the bond. The state practice provided the opportunity for such a hearing by an appeal after the entry of judgment.

"The practice prescribed was constitutional. Due process requires that there be an opportunity to present every available defense; but it need not be before the entry of judgment. *York v. Texas,* 137 U. S. 15. Cf. *Grant Timber & Mfg. Co. v. Gray,* 236 U. S. 133; *Bianchi v. Morales,* 262 U. S. 170. See also *Phillips v. Commissioner,* 283 U. S. 589, 596-597; *Coffin Bros. & Co. v. Bennett,* 277 U. S. 29. An appeal on the record which included the bond afforded an adequate opportunity. Thus, the entry of judgment was consistent with due process of law. We need not enquire whether its validity may not rest also on the ground that the Surety Company, by giving the bond, must be taken to have consented to the state procedure. Compare *United Surety Co. v. American Fruit Product Co.,* 238 U. S. 140, 142; *Corn Exchange Bank v. Commissioner,* 280 U. S. 218, 223."

The thrust of that decision, specifically involving a judgment entered on the basis of agreement of the debtor, is that the Constitution does not require one form of state procedure as against another so long as notice and an opportunity for a hearing are provided. The rationale of that case was reaffirmed by this Court last term in *Boddie v. Connecticut*, 401 U. S. 371 (1971) wherein the majority opinion said at 378:

> "Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, see *Windsor, supra*, at 278, or who, without justifiable excuse violates a procedural rule requiring the production of evidence necessary for orderly adjudication, *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 351 (1909). What the Constitution does require is 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner,' *Armstrong v. Manzo*, 380 U. S. 545, 552 (1965) (emphasis added), 'for [a] hearing appropriate to the nature of the case,' *Mullane v. Central Hanover Tr. Co., supra*, at p. 313. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings."

The court below and appellants in their argument rely heavily on *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969). That case invalidated a state statutory procedure which permitted pre-judgment garnishment of wages. The majority opinion was explicitly based on the fact that the case involved "wages—a specialized type of property presenting distinct problems in our economic system" and on the harsh practical effects on a wage-earning family of a freeze on the use of wages by reason of garnishment. *Id.* at

340. In Pennsylvania, wages are not subject to either attachment (Act of April 15, 1845, P. L. 459, § 5, Pa. Stat. Ann. tit. 42, § 886 (Purdon 1966)), or assignment (Act of May 20, 1891, P. L. 96, Pa. Stat. Ann. tit. 43, § 271 (Purdon 1964)). Moreover, neither a judgment on the basis of agreement or otherwise nor the lien of an execution levy deprives the debtor of the use of any property in his possession or even necessarily prevents its disposition.[7] Furthermore, no sale of any property of a debtor on a judgment entered on the basis of agreement can occur before the expiration of the required twenty day notice period during which relief from the judgment and an interim stay can be sought. Hence, the present case is not comparable to *Sniadach* on the operative facts that prompted that decision.

Appellants speak of *Sniadach* as though it stated a broad constitutional rule prohibiting any lien on property of a debtor prior to the opportunity for a hearing under state procedure. That interpretation exaggerates the decision since, if it were so, the majority opinion would not have been based as it was on the special character of wages as property. Even if the Court had framed a rule as broad as appellants imply, it would still not determine the question here. In *Sniadach* the state garnishment procedure was available to a creditor without any agreement of debtor; in Pennsylvania the judgment procedure is wholly dependent on a written agreement which must meet the strict test of the judicial rules for determining the reality of the consent.

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7. A transfer could be made subject to the lien and any agreement the debtor would have to make to provide for payment of that lien if the judgment should be sustained would not alter what he would have to do to satisfy such judgment even if the property had not been subjected to lien by agreement. If the judgment should not be sustained the lien would be immaterial in any event.

Appellants' argument, as to *Sniadach*, is tantamount to an attack on all consensual liens which are fundamental to the normal workings of both personal and business finance in America. If a lien on realty obtained through a judgment entered on the basis of agreement were constitutionally invalid on its face, it is not evident what theory could consistently support the validity of a real estate mortgage which in Pennsylvania (and it is believed generally throughout the Nation) results in a lien of higher dignity[8] and can be obtained without any use of court procedures and the accompanying exercise of immediate judicial control. Even more difficult questions might be raised about pledges of marketable securities, rights of set-off and installment sale agreements for automobiles and other personal property whose enforcement may often be accomplished without any use of public offices or records. While these analogous forms of consensual liens and security commonly provided as collateral for extension of credit are not under attack in this action, the implications for them in the basis of any constitutional decision in this case indicate that the question involves far more than one isolated state procedure.

D. The Use of $10,000 Annual Income as a Determinant of Due Process Rights by the Court Below Is Without Support in Law or Reason and Was Error Infecting Its Entire Decision.

The opinion of the court below suggests that it was concerned that the extensive effects noted above might flow

8. The lien of a mortgage which precedes other liens except mortgages is not discharged by a judicial sale on a subsequent lien as is a judgment.

The lien of a judgment entered within 4 months of the filing of a petition under the Bankruptcy Act is void while a mortgage is not.

The lien of a judgment requires revival each five years while that of amortgage does not.

from its decision and thus made an effort to confine its ruling to cases of persons with limited educational backgrounds and limited resources. For that purpose, on the basis of sparse, fragmentary and largely hearsay "evidence", it gave undifferentiated treatment to all debtors with annual incomes of less than $10,000. The court fixed a limit on the scope of its ruling because it said that the ruling would "make it more difficult for those affected by this decision to secure credit." 314 F. Supp. at 1099. The lower court's opinion itself shows internal inconsistency and lack of rational support for the use of annual income as a determinant of Due Process rights. As to one of the plaintiffs actually before the court, the judgment involved was in the amount of $25,800 which in common experience is not typical of the credit used by the economically deprived. Common experience likewise contradicts the court's presumption that persons with less than $10,000 annual income are as a class so incapable of comprehending their credit transactions that the Federal Constitution must invalidate them.

The lower court's selection of $10,000 as the critical annual income was on too attenuated an evidentiary basis to support a constitutional ruling. The court accepted as "evidence" a study of debtors in default in certain cities only one of which is identified as being in Pennsylvania. The court below gave no indication of any determination by it of the objectivity, statistical validity or reliability of the document even though it was said to survey only 245 debtors in the one city located in Pennsylvania while the opinion says that in that single city more than 50,000 judgments were entered in one year by confession; the court does not even indicate whether this small sample was restricted to debtors who had authorized the entry of judgment.[9] From

9. The relative significance of the sample is diminished even more in comparison with the total number of judgment notes and

this sparse and possibly meaningless data, the lower court drew inferences as to the significance of particular dollar amounts of annual income. This methodology for decision of a Due Process question is as impermissible as it would have been if the court had used to find the judgment procedure valid a similarly described study which reported that a like number of borrowers understood the meaning of an agreement to enter judgment and consented to it in order to provide security for credit.

The whimsicality of the $10,000 income determinant is actually a distraction from the central issue whether any such classification is an appropriate test of Due Process rights. There is nothing in the opinion of the court below to justify the idea that the economic or educational condition of particular individuals affects them or the exercise of their rights differently in a judgment action than in an assumpsit action under Pennsylvania procedures.

The nub of this case is whether both such procedures are equally valid under Due Process requirements since both provide for notice and opportunity for hearing which are substantially the same. The immediate question before the Court is whether the judgment procedure in Pennsylvania satisfies the requirements of Due Process. It is submitted that in the context of the Pennsylvania law and procedures described above, the judgment procedures are well within the commands of the Bill of Rights so that the order of the court below, to the extent it ruled them unconstitutional in any respect, should be reversed.

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similar agreements executed in Pennsylvania because of the widespread practice of not filing all judgments which are authorized and the absence of authority to file those which may be entered only after default.

II. THE FEDERAL COURTS SHOULD ABSTAIN FROM RULING ON THE CONSTITUTIONALITY OF THE PENNSYLVANIA JUDGMENT PROCEDURES UNTIL THE SUPREME COURT OF PENNSYLVANIA CONSIDERS THE QUESTION IN THIS CASE.

The judgment procedure in this case bears a patina of history that appears to be as old as any English common law procedure surviving in modern American law. It is no mere ancient relic, however. On the contrary, it is deeply imbedded in the Pennsylvania law of security transactions and creditors rights and has been extensively used in commerce in that state and by the State Government itself.[10] The strong presumption of Constitutionality that attaches to a legal technique extensively practised throughout several centuries possibly explains the apparent absence of any decision of the Pennsylvania Supreme Court dealing explicitly with the validity of the judgment procedure.[11]

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10. A broad range of Pennsylvania statutes concerning public affairs and exercises of the police power provide for use of warrants of attorney to confess judgment. Examples are: bonds to secure payment of deposits of State funds, Pa. Stat. Ann., tit. 72, § 505 (Purdon 1971); bonds of licensees under the Liquor Code, *Id.*, tit. 47, § 4-465(a); and bonds of county tax collectors, *Id.*, tit. 72, § 5541. Procedures comparable to the judgment procedures are found in other statutes such as the Tax Reform Code adopted in 1971 which permits a lien for sales and use tax to be filed without notice and a writ of execution to issue after 10 days notice by mail. Act. No. 2, § 242(b) (Purdon Pa. Legisl. Serv., 1971).

None of these and similar interests of the State is represented on this appeal by reason of the position of the Pennsylvania Attorney General, see footnote 1 above.

11. "The Fourteenth Amendment, itself a historical product, did not destroy history for the states and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, as is well illustrated by *Ownbey v. Morgan*, 256 U. S. 94, 104, 112." Mr. Justice Holmes in *Jackman v. Rosenbaum Co.*, 260 U. S. 22, 31 (1922).

This case, even if it involved merely a state statute, would accordingly present an appropriate occasion for the "abstention doctrine" recently applied in *Fornaris v. Ridge Tool Co.*, 400 U. S. 41 (1970) and *Reetz v. Bozanich*, 397 U. S. 82 (1970). The appropriateness of the application of that doctrine is doubled in the present case since the matter involved is essentially a common law procedure not dependent on statute and is additionally under the Pennsylvania Constitution a subject for the exclusive rule-making authority of the State Supreme Court.[12]

The court below should, therefore, have withheld any decision on the Constitutional question presented to it until the Pennsylvania Supreme Court had ruled on the question. It is true that the judgment procedure has the implicit sanction of the Pennsylvania courts from the course of its decisions over two centuries and from the fact that the Supreme Court of the State has itself promulgated rules for the judgment procedure. Yet a ruling by that court on the question in this case could have avoided the need for decision of the constitutional question or could have materially changed the scope and nature of the question.

First, the Pennsylvania court could have determined authoritatively the precise procedural effects of the judgment procedure as compared with the assumpsit procedure. Second, if that Court deemed the procedure invalid in any particular respect it could have forthwith cured the defect by promulgation of an appropriate rule. Third, even if the court considered the procedure valid, as it might be expected to do on the basis of the past history of its decisions and rules, it could nevertheless have determined to reinforce that validity by supplementary rules.

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12. The fact that the validity of state court procedures and rules rather than of a state statute are essentially involved in this case might raise a question whether it was properly brought to this Court on appeal rather than on certiorari under 28 U. S. C. 1253.

All the reasons that generally underlie the abstention doctrine are appropriate to this case including considerations of Federal-State relationships, the interests of sound judicial administration and the economical use of judicial resources. In addition, there are specific reasons which apply to this case which compel the conclusion that this Court abstain from decision pending proceedings in the state's highest court. The constitutional issue presented by this appeal has been blurred by the errors and misconceptions of the lower court as to the relative practical effects of the Pennsylvania judgment and assumpsit procedures. An authoritative ruling by the state court would at the least disentangle the constitutional question from the problems of assessing the state law in a manner less vulnerable to question than is the opinion of the court below. The terms of the final order of the court below shows the absence of impelling urgency for its decision since its injunction was generally prospective [13] and even as to cases it covered it provided for further state court proceedings.

It was especially inappropriate for the court below to undertake immediately [14] and unnecessarily an evaluation

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13. The lower court's postponement of the effective date of its order in a manner related to the sessions of the General Assembly of Pennsylvania suggests that it did not realize that the Pennsylvania Supreme Court rather than the legislature has ultimate rule-making power on the subject of confession of judgment under Article V, section 10(c) of the Pennsylvania Constitution.

14. An opportunity for an early consideration of the matter by the Pennsylvania Supreme Court would seem readily available under the Pennsylvania Appellate Court Jurisdiction Act of 1970 which provides:

"§ 211.205 Extraordinary jurisdiction.

"Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or justice of the peace of the Commonwealth involving an issue of immediate public impor-

of a matter so deeply imbedded in state law and practice because of the potential for widespread disruption of property rights that could be caused by the decision of this case. Appellants argue that the judgment procedure should be declared invalid on its face without limitation to prospective application only. If that argument were sustained the effects on real estate titles in Pennsylvania would be massively detrimental, as is pointed out in the Brief of Amicus Curiae Pennsylvania Land Title Association filed in this appeal, and could cause harm to members of the class appellants undertake to represent far in excess of any harm that appellants claim results from the procedure attacked. This factor alone should have moved the court below to withhold its decision until the state court could consider this matter in the full context of Pennsylvania law.

For all of the above reasons, it is submitted that this Court should not hold the Pennsylvania judgment procedure unconstitutional in any respect without awaiting a prior consideration of the matter by the Supreme Court of Pennsylvania.

CONCLUSION.

The Pennsylvania judgment procedures in question are common law court procedures established by the Pennsylvania Supreme Court and are subject to the effective supervision and control of the Pennsylvania courts. A careful review and comparison of these procedures with the assumpsit procedures approved by the court below clearly demonstrate that the judgment procedures provide sufficient notice and ample opportunity for hearing and relief and therefore fully comply with the requirements of Due Process.

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tance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done". Pa. Stat. Ann., tit. 17, § 211.205 (Purdon Supp. 1971)

The decision of the court below should accordingly be reversed to the extent that it declared the Pennsylvania judgment procedures unconstitutional.

In the alternative, for all of the reasons stated above, including but not limited to the special role of the Pennsylvania Supreme Court under the State Constitution with respect to the court procedures involved, the misconceptions of the lower court concerning Pennsylvania law and practice and in the interest of Federal-State relationships particularly in the area of sound judicial administration, the federal courts should abstain from deciding the constitutional issue adversely until the Supreme Court of Pennsylvania considers the question.

Respectfully submitted,

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